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State v. Pressley Respondent's Brief Dckt. 40868

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IN THE SUPREME COURT OF THE STATE OF IDAHO

COPY

STATE OF IDAHO,)	
)	No. 40868
Plaintiff-Respondent,)	
)	Ada Co. Case No.
vs.)	CR-2012-13214
)	
TIMOTHY THYS PRESSLEY,)	
)	
Defendant-Appellant.)	

BRIEF OF RESPONDENT

APPEAL FROM THE DISTRICT COURT OF THE FOURTH JUDICIAL
DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE
COUNTY OF ADA

HONORABLE MICHAEL E. WETHERELL
District Judge

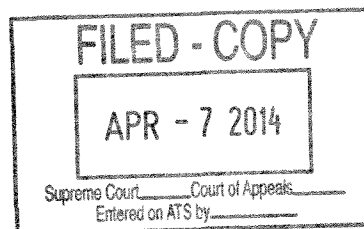
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STATEMENT OF THE CASE

Nature Of The Case

Timothy Thys Pressley appeals from his judgment of conviction for aggravated assault, entered upon a jury's verdict. For the first time on appeal, he asserts that a fatal variance existed between the state's charging document and the district court's instructions to the jury.

Statement Of The Facts And Course Of The Proceedings

On September 6, 2013, Pressley and two fellow travelers were resting at a Travel Center while they hitchhiked. (Tr., p.101, L.7 – p.102, L.10; p.198, L.20 – p.199, L.12.) Some of the Travel Center's other customers complained about the behavior of Pressley and his companions and the store manager, Mr. Brekke, approached them. (Tr., p.103, L.20 – p.104, L.3.) Mr. Brekke told Pressley and his associates about the complaints and asked them to leave, which they agreed to do. (Tr., p.106, L.18 – p.107, L.11; p.199, L.20 – p.200, L.2.) They did not leave, however, but instead became "sidetracked" by drinking whiskey. (Tr., p.201, Ls.7-16.)

Shortly thereafter, Mr. Brekke received additional complaints about Pressley's and his companions' behavior. (Tr., p.107, L.23 – p.108, L.5.) Mr. Brekke told Pressley and his associates that they had to leave or the police would be called. (Tr., p.108, L.20 – p.109, L.5.) They became belligerent. (Tr., p.109, Ls.1-3.) Pressley then intentionally released a pit bull at Mr. Brekke. (Tr., p.110, L.24 – p.112, L.10; p.129, L.5 – p.130, L.18.) The dog attacked Mr. Brekke, biting him in the side a couple of times. (Tr., p.112, Ls.4-10; p.113, Ls.3-5; p.156, L.12 – p.157, L.23.) Mr. Brekke restrained the dog by taking it to the ground and pinning it. (Tr., p.113, Ls.6-12; Tr., p.158, Ls.8-22.)

Pressley then ran at Mr. Brekke and punched him in the face and head. (Tr., p.115, Ls.6-25; p.160, Ls.1-16; p.211, Ls.4-25.)

The state charged Pressley with aggravated assault for intentionally releasing a pit bull at Mr. Brekke, and misdemeanor battery for punching Mr. Brekke. (R., pp.26-27.) Pressley pleaded not guilty and went to trial. (R., pp.31, 48-51.) At the conclusion of the trial, the jury returned guilty verdicts on both counts. (R., pp.102-03.) The district court entered a judgment of conviction against Pressley and sentenced him to five years with two and a half years fixed. (R., pp.105-08.) Pressley filed a Rule 35 motion (R., pp.118-22), which was denied (R., pp.127-29). Pressley filed a notice of appeal timely from the judgment. (R., pp.113-15.)

ISSUE

Pressley states the issue on appeal as:

Was Mr. Pressley denied his right to a fair trial by the district court's erroneous instructions allowing the jury to convict Mr. Pressley of criminal conduct he was not charged with committing?

(Appellant's brief, p.3.)

The state rephrases the issue as:

Has Pressley failed to show fundamental error entitling him to review of his unpreserved claim of instructional error?

ARGUMENT

Pressley Has Failed To Show Fundamental Error In The District Court's Instructions To The Jury

A. Introduction

For the first time on appeal, Pressley argues that a fatal variance existed between the state's charging document and the district court's instructions to the jury. (Appellant's brief, pp.4-13.) This Court must decline to review Pressley's unpreserved variance claim because he has failed to demonstrate from the record that the instructions actually create a variance, much less that his claimed error rises to the level of fundamental error.

B. Standard Of Review

Whether a jury was properly instructed is a question of law over which the appellate court exercises free review. State v. Draper, 151 Idaho 576, 587-88, 261 P.3d 853, 864-65 (2011) (citation omitted). Whether there is a variance between a charging document and the jury instructions at trial, and whether such variance is fatal to the conviction, are also questions of law given free review on appeal. State v. Sherrod, 131 Idaho 56, 57, 951 P.2d 1283, 1284 (Ct. App. 1998). "An erroneous instruction will not constitute reversible error unless the instructions as a whole misled the jury or prejudiced a party." State v. Shackelford, 150 Idaho 355, 373-74, 247 P.3d 582, 600-01 (2010) (citation omitted).

C. There Was No Variance Between The Charging Document And The District Court's Instructions To The Jury

"It is a fundamental tenet of appellate law that a proper and timely objection must be made in the trial court before an issue is preserved for appeal." State v. Carlson, 134 Idaho 389, 398, 3 P.3d 67, 76 (Ct. App. 2000); see also Draper, 151 Idaho at 588, 261 P.3d at 865 ("An error generally is not reviewable if raised for the first time on appeal.") (citing State v. Sheahan, 139 Idaho 267, 277, 77 P.3d 956, 966 (2003)). This same principle applies to alleged errors in jury instructions. See I.C.R. 30(b) ("No party may assign as error the giving of or failure to give an instruction unless the party objects thereto before the jury retires to consider its verdict, stating distinctly the instruction to which the party objects and the grounds of the objection."); Draper, 151 Idaho at 588, 261 P.3d at 865. Absent a timely objection, the appellate courts of this state will only review an alleged error under the fundamental error doctrine. Id.; see also State v. Perry, 150 Idaho 209, 227, 245 P.3d 961, 979 (2010).

Pressley did not object to the jury instructions below. Thus, to prevail on appeal, Pressley must show that the complained of instruction rises to the level of fundamental error. Review under the fundamental error doctrine requires Pressley to demonstrate that the error he alleges: "(1) violates one or more of [his] unwaived constitutional rights; (2) plainly exists (without the need for any additional information not contained in the appellate record, including information as to whether the failure to object was a tactical decision); and (3) was not harmless." Perry, 150 Idaho at 228, 245 P.3d at 980. Correctly applying this three-prong test to Pressley's claim, he has failed to show fundamental error entitling him to review of this unpreserved issue.

For the first time on appeal, Pressley asserts that the district court erred by giving jury instructions that varied from the state's charging document. (Appellant's brief, pp.4-13.) Pressley has failed, however, to show any variance. "A variance arises when the evidence adduced at trial establishes facts different from those alleged in the indictment." Dunn v. United States, 442 U.S. 100, 105 (1979). A variance also occurs where the jury instructions given at trial allow the jury to convict the defendant of the charged crime, but on one or more alternative theories than alleged in the charging document. See, e.g., State v. Windsor, 110 Idaho 410, 716 P.2d 1182 (1985); State v. Montoya, 140 Idaho 160, 166, 90 P.3d 910, 916 (Ct. App. 2004).

If it is established that a variance exists, the appellate court must examine whether it rises to the level of prejudicial error requiring reversal of the conviction. See State v. Brazil, 136 Idaho 327, 329, 33 P.3d 218, 220 (Ct. App. 2001). A variance is fatal if it amounts to a "constructive amendment" or "deprives the defendant of his right to fair notice or leaves him open to the risk of double jeopardy." State v. Jones, 140 Idaho 41, 49, 89 P.3d 881, 889 (Ct. App. 2003) (citations omitted); see also State v. Adamcik, 152 Idaho 445, 479, 272 P.3d 417, 451 (2012) (variance requires reversal "only where it deprives the defendant of his right to fair notice or leaves him open to the risk of double jeopardy") (citation omitted). A constructive amendment occurs if a variance alters the charging document to the extent the defendant is tried for a crime of a greater degree or a different nature. Jones, 140 Idaho at 49, 89 P.3d at 889; State v. Colwell, 124 Idaho 560, 566, 871 P.2d 1225, 1231 (Ct. App. 1993).

There was no variance in this case because the factual basis for the charge was the same from beginning to end. The state charged Pressley with aggravated assault, alleging:

That the Defendant, TIMOTHY THYS PRESSLEY, on or about the 6th day of September, 2012, in the County of Ada, State of Idaho, did intentionally, unlawfully and with apparent ability threaten by word and/or act to do violence upon the person of Jeffrey Brekke, by a means likely to produce great bodily harm, to wit: by releasing a pit bull breed dog at Jeffrey Brekke, which caused a well-founded fear in Jeffrey Brekke that such violence was imminent.

(R., p.27.) The prosecutor began his opening argument at trial by telling the jury that the evidence would show that on September 6, 2012, Pressley assaulted Mr. Brekke by intentionally releasing a pit bull at him. (Tr., p.91, Ls.11-18; p.94, L.12 – p.95, L.20; p.96, L.24 – p.97, L.1.) The state then spent the trial proving that case: Mr. Brekke testified that Pressley intentionally released his pit bull at him. (Tr., p.110, L.24 – p.112, L.10; p.129, L.5 – p.130, L.18.) Pressley's releasing the pit bull at Mr. Brekke caused him to feel that he was in danger of physical harm. (Tr., p.112, L.19 – p.113, L.2.) Another witness confirmed the dog attack. (Tr., p.156, L.12 – p.157, L.23.) At the close of trial, the district court instructed the jury:

In order for the defendant to be guilty of Aggravated Assault as charged in Count I, the state must prove each of the following:

1. On or about September 6, 2012,
2. in the state of Idaho,
3. the defendant, Timothy Thys Pressley, committed an assault upon Jeffrey Brekke,
4. by releasing a pit bull breed dog at Jeffrey Brekke, and

5. the defendant committed that assault by any means of force likely to produce great bodily harm.

If any of the above has not been proven beyond a reasonable doubt, you must find the defendant not guilty. If each of the above has been proven beyond a reasonable doubt, then you must find the defendant guilty.

(Jury Instruction No.19; R., p.80; see also 1/15/2013 Closing Argument Tr., p.9, L.16 – p.10, L.8.) As is clear from the record, to convict Pressley of aggravated assault, the jury had to find that Pressley intentionally released a pit bull at Mr. Brekke, which was the same theory of the case presented by the state at trial, and the same factual basis for the charge of aggravated assault. Therefore there was no variance in this case.

On appeal, Pressley asserts that the district court created a variance by giving the jury the stock instruction on the definition of assault, which explains that an assault occurs when a defendant either attempts to harm a victim or threatens to harm a victim. (Appellant's brief, pp.5-7; see also R., p.79 (instruction defining assault).) Pressley argues that the information charged only the threat of violence so introducing an attempt to harm theory was error. (Id.) This is not a clear variance, but even if it were, it would not be fatal because the crime articulated in the jury instructions—assault—was not of a greater degree or different nature than the crime charged, and the underlying factual nature of that crime—releasing a pit bull at Mr. Brekke—was unaltered.

Pressley's supposed variance creates no risk of double jeopardy. Whether he attempted or threatened harm, it would still be assault when Pressley intentionally released a pit bull at Mr. Brekke. Even if the theories were mutually exclusive, which they are not, had Pressley been acquitted on either theory the state would not have been able to bring a second prosecution on the other. In order to acquit Pressley, the

jury would necessarily have to find that he did not intentionally release a pit bull at Mr. Brekke, which was the central element of the crime.

Furthermore, the supposed variance does not create any clear notice issues for Pressley's defense. Pressley was given notice that he was facing trial for committing assault by intentionally releasing a pit bull at Mr. Brekke, and that is the act for which he stood trial. There certainly was no embarrassment to Pressley's defense: Whether Pressley attempted to harm Mr. Brekke by releasing the pit bull at him or meant to threaten harm to Mr. Brekke by releasing the pit bull at him was not at issue in this case. According to defense counsel, the only issue at trial was whether the jury believed beyond a reasonable doubt that Pressley had in fact intentionally released a pit bull at Mr. Brekke. (1/15/2013 Closing Argument Tr., p.26, Ls.15-18.) Pressley's defense was multifaceted: First, he asserted that the red dog that attacked Mr. Brekke was not in fact a pit bull (see Tr., p.202, L.21 – p.203, L.5.); second, he asserted that he did not release the dog at Mr. Brekke because he never controlled the dog in the first place (see Tr., p.205, L.23 – p.206, L.20; p.211, Ls.7-11; p.227, Ls.14-17). Pressley claimed the dog belonged to his friend, so he was not responsible for it or its behavior. (Tr., p.202, L.24 – p.203, L.1; p.207, L.21 – p.208, L.11; p.224, Ls.2-16.) Finally, he claimed that releasing a dog on another person was not in his character. (Tr., p.213, Ls.9-14.)

Contrary to Pressley's assertions, there is no fatal variance in the district court's instructions. Pressley was not tried for a crime of a greater degree or a different nature from the one with which he was charged—assault by intentionally releasing a pit bull at Mr. Brekke. Because the district court's instructions did not put Pressley at risk of

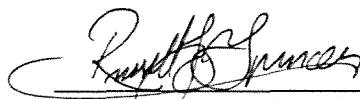
double jeopardy and did not create any notice issues for his defense, even if using the stock instruction to define assault for the jury constituted a variance, it could not be fatal.

The state charged Pressley with committing the crime of assault by intentionally releasing a pit bull at Mr. Brekke. The jury convicted Pressley of the same crime—assault—on the same factual basis—by intentionally releasing a pit bull at Mr. Brekke. Because the jury convicted Pressley of the same crime on the same factual basis as that charged by the state, there was no variance in the district court's instructions. Pressley has failed to show error, much less fundamental error, entitling him to review of this unpreserved issue.

CONCLUSION

The state respectfully requests that this Court affirm Pressley's conviction for assault, committed by intentionally releasing a pit bull at Mr. Brekke.

DATED this 7th day of April, 2014.



RUSSELL J. SPENCER
Deputy Attorney General

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this 7th day of April, 2014, served a true and correct copy of the attached BRIEF OF RESPONDENT by causing a copy addressed to:

JASON C. PINTLER
DEPUTY STATE APPELLATE PUBLIC DEFENDER

to be placed in The State Appellate Public Defender's basket located in the Idaho Supreme Court Clerk's office.

A handwritten signature in cursive script, appearing to read "Russell J. Spencer", is written over a horizontal line.

RUSSELL J. SPENCER
Deputy Attorney General

RJS/pm